



Office of the Attorney General  
State of Texas

August 26, 1998

DAN MORALES

ATTORNEY GENERAL

Mr. James G. Nolan  
Senior Attorney  
Information Release Unit  
Texas Workforce Commission  
101 E. 15th Street, Room 651  
Austin, Texas 78748

OR98-2058

Dear Mr. Nolan:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 116868.

The Texas Workforce Commission (the "Commission") received a request for the appeal files considered and memoranda the Commissioners relied on during its March 31 and April 14, 1998 sessions. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107(1) and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

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<sup>1</sup>You submitted representative samples of the requested information. In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). You assert that section 552.103 applies to the requested information under three theories.

Under the first theory, you maintain that the requested information relates to the case of *Gutierrez v. Rath*, No. H-96-2308, which you say is pending in the United States District Court for the Southern District of Texas. However, you submitted a copy of a signed mediated settlement agreement in this case. Further, the requestor submitted to this office a copy of the signed "Order Granting Dismissal of the Suit." You state that in the Order, the court expressly retains jurisdiction over unresolved issues and that no final order has been issued in the cases. The Order states that "[t]his Court shall retain jurisdiction over the settlement agreement; [t]his Court shall resolve the issue of attorneys fees; and [t]his suit is dismissed with prejudice."

It is well established that a dismissal with prejudice functions as a final determination on the merits. *Mossler v. Shields*, 818 S.W.2d (Tex. 1991); *see also Lubbock Mfg Co. v. Int'l Harvester Co.* 584 S.W.2d 908 (Civ. App.-Dallas 1979, writ ref'd n.r.e.) (judgment of dismissal entered pursuant to settlement agreement constitutes final judgment). You have not established that the finality of the judgment is affected by the court's retention of jurisdiction of the settlement agreement or power to resolve the attorney fee issue. Nor have you explained how the information at issue relates to an unresolved issue. The applicability of section 552.103(a) ends once the litigation is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Thus, in regard to your first theory under section 552.103, we conclude that the exception is inapplicable.

Under your second theory, you argue that the Commission reasonably anticipates that suits will be filed against the Commission for judicial review of one or more of the Commission's decisions. You state that each of the cases has been appealed twice and that the Commission ordered one of the cases to be resubmitted. You explain that it generally takes 60 to 90 days following the issuance of a decision for the Commission to be served with citation in a civil case seeking judicial review. You also explain that all of the cases discussed at the April 14, 1998 docket are pending the appointment of a new Commissioner, or remanded to the appeal tribunal for rehearing.

Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). We conclude that you have not established that litigation is reasonably anticipated in the cases the Commission heard on the referenced dates. *See* Open Records Decision No. 638 (1996) at 3 (duty of governmental body to update attorney general concerning reasonably anticipated litigation).

Under your third and final theory under section 552.103, you argue that the Commission's appeal process constitutes litigation for purposes of section 552.103. This office has determined that a contested case under the Administrative Procedure Act (the "APA"), Government Code 2001, constitutes litigation for purposes of section 552.103. *See*

Open Records Decision No. 588 (1991). You inform us that Commission appeal hearings are not governed by the APA. Additionally, we note that the Commission is not a party in the appeal process. Rather, the Commission renders the decision at the conclusion of the process. Thus, we find that the appeal process does not constitute litigation for purposes of section 552.103.

Section 552.101 of the Government Code excepts from disclosure information that is made confidential by law. You raise section 301.081 of the Labor Code, which reads in part as follows:

(a) Each employing unit shall keep employment records containing information as prescribed by the commission and as necessary for the proper administration of this title. The records are open to inspection and may be copied by the commission or an authorized representative of the commission at any reasonable time and as often as necessary.

(b) The commission may require from an employing unit sworn or unsworn reports regarding persons employed by the employing unit as necessary for the effective administration of this title.

(c) Employment information thus obtained or otherwise secured may not be published and is not open to public inspection, other than to a public employee in the performance of public duties, except as the commission considers necessary for the proper administration of this title.

This office interpreted the predecessor provision of section 301.081(c) to apply to information the Commission obtained from the employers' records and from the reports that employers are required to file with the Commission. Open Records Decision No. 599 (1992) (construing former V.T.C.S. art. 5221b-9). We find one document in exhibit A that appears to be an employment record an employer was required to submit to the Commission. If we have correctly characterized this record, the Commission must not release it to the requestor. Gov't Code § 552.101; Labor Code § 301.081.

Additionally, the Commission must not release certain information that is made confidential under federal regulations enacted pursuant to statutory authority. *See* Open Records Decision Nos. 599 (1992), 476 (1987). This confidential information includes "wage information" and "claim information," as defined in the federal regulations. *See id.* "Wage information" is defined as

information about wages as defined in the State's unemployment compensation law and includes the Social Security Number (or numbers, if more than one) and quarterly wages of an employee, and the name, address, State, and (when known) Federal employer identification number of an employer reporting wages under a State

unemployment compensation law, except that in a State in which wages are not required to be reported under the unemployment compensation law, "wage information" means:

(1) That wage information which is reported under provisions of State law which fulfill the requirements of section 1137 of the Social Security Act; or

(2) That information which is obtained through an alternative system which fulfills the requirements of section 1137 of the Social Security Act.

20 CFR § 603.2(b). "Claim information" means information regarding:

(1) Whether an individual is receiving, has received or has applied for unemployment compensation;

(2) The amount of compensation the individual is receiving or is entitled to receive;

(3) The individual's current (or most recent) home address; and

(4) Whether the individual has refused an offer of work and, if so, a description of the job offered including the terms, conditions, and rate of pay.

(5) Any other information contained in the records of the State unemployment compensation agency which is needed by the requesting agency to verify eligibility for, and the amount of, benefits.

20 CFR § 603.2(c). Thus, we conclude that, pursuant to federal regulation, the Commission must not release "wage information," including employees' social security numbers and quarterly wages, an employer's name, address, state and federal employer identification number. Furthermore, the Commission must not release "claim information," as defined in the federal regulations. See Open Records Decision No. 476 (1987).

The submitted information also contains information protected from disclosure based on section 552.101 in conjunction with the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We have marked the private information. Additionally, the submitted information contains one document that is confidential pursuant to the Medical Practices Act. V.T.C.S. art. 4495b. § 5.08(b) (providing confidentiality for records that physician creates or maintains regarding identity, diagnosis, evaluation, or treatment of patient by physician.). We have marked the information.

You raise section 552.107(1) in regard the memoranda prepared by the Commissioners' attorneys. Section 552.107(1) of the Government Code states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 at 5; 462 (1987) at 13-14. This exception applies only to information that reveals attorney advice and opinion or client confidences. *See* Open Records Decision No. 574 (1990). We agree that section 552.107(1) applies to portions of the information and have marked the documents accordingly.

You also raise section 552.111 of the Government Code, which applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). In this case, we do not believe section 552.111 applies to any information not already covered by section 552.107(1).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KHH/mjc

Ref.: ID# 116868

Enclosures: Marked documents

cc: Mr. Bruce P. Bower  
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(w/o enclosures)